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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

## RESPONDENT'S PETITION FOR A REHEARING AND FOR INCIDENTAL RELIEF.

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# INDEX.


PAGE

Respondent's Petition for a Rehearing and for Incidental Relief ..... 1

Certificate of Counsel ..... 14


## TABLE OF CASES.


Maryland Dry Dock Company, In re, 49 N.L.R.B. 733 (May 11, 1943) ..... 7

N.L.R.B. v. E. C. Atkins and Co., ..... U. S. ..... (decided May 19, 1947) ..... 5

N.L.R.B. v. Jones & Laughlin Steel Corporation, 154 Fed. (2d) 932 (April 4, 1946) ..... 1, 3, 11

Packard Motor Car Company v. N.L.R.B., ..... U. S. ..... (decided March 10, 1947) ..... 8, 9

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## RESPONDENT'S PETITION FOR A REHEARING AND FOR INCIDENTAL RELIEF.

Jones & Laughlin Steel Corporation, the respondent in this case, presents this, its petition for a rehearing of this case, and in support thereof respectfully shows the following matters of fact and law:

FIRST: This case was argued before the Court on March 7, 1947, upon a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit, reported as *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 154 Fed. (2d) 932 (April 4, 1946).

SECOND: By its decision aforesaid, the Circuit Court of Appeals had held invalid a Certification of Rep-

resentatives issued by the National Labor Relations Board on June 5, 1943 (R. 34) and a final Order based by the Board upon the Certification (R. 77). By the Board's Certification and final Order, the respondent Steel Corporation had been commanded to recognize and bargain with the United Steelworkers of America as the exclusive representative, under the National Labor Relations Act, of a force of about sixty armed and uniformed policemen, employed to enforce Company rules and public laws in respondent's Otis Works, at Cleveland, Ohio. During the recent war, and at the time of the Certification, these policemen had been enrolled by the United States Army as Auxiliary Military Police. At all other times they had been sworn and commissioned as peace officers of the State of Ohio. The Union had been qualified and recognized for years as exclusive representative of the 4,700 rank and file steel workers, employed in the Otis works, and subject from day to day to the public and private authority of the plant policemen. The validity of the Certification and final Order had been questioned by the respondent, both before the Board and in the Circuit Court of Appeals, upon these grounds:

1. That the authority of the Board, in such cases, was limited by the words and implications of the National Labor Relations Act, in such manner as to forbid the making or enforcement of any order of the Board which would tend to subvert any generally important public interest, such as the public interests in the enforcement of law and order in large industrial establishments, and in the military security of such establishments in time of war.

2. That an order of the Board which would subject the Otis Works policemen to compulsory representation by a Union dominated by its numerically superior membership of rank and file steel workers would, if enforced, necessarily tend to impair the freedom of the policemen to enforce Company rules and public laws against rank and file Union members, and thereby to subvert the public interests aforesaid.

It was upon these grounds that the Circuit Court of Appeals sustained the respondent's contention that the Board's final Order must be denied enforcement. That Court said, *inter alia* (154 Fed. (2d) pp. 934-935):

"* * * The precise question here is not whether the plant guards should be permitted to organize, but whether the peculiar classification into which they fall makes it improper for the Board to permit their organization by the same union which represents the production employees. * * *

"As pointed out in the previous opinion [146 Fed. (2d) 718], it is the duty of the Board to consider the public interest as a material factor in selecting appropriate units for collective bargaining. * * * We adhere to our conclusion that in the order involved here the Board failed to give adequate consideration to the public welfare. A contrary conclusion would open wide the door to disorderly and criminal acts because of the limitation which the Board's order places on the power of the Government to furnish adequate police protection."

THIRD: On May 19, 1947, this Court handed down its decision of the case. The opinion of this Court (not

yet reported) was written by Mr. Justice MURPHY and concurred in by Mr. Justice REED, Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE. By this opinion, the Court determined that the judgment of the Circuit Court of Appeals should be reversed, and that the Board's final order should be enforced against the respondent. The CHIEF JUSTICE, Mr. Justice FRANKFURTER, Mr. Justice JACKSON and Mr. Justice BURTON dissented, substantially for the reasons set forth in the opinion of the Court below, which has been described.

FOURTH: There had been no prior judicial decision of the point presented here, except that of the Court below in this case. From the language of the opinion of Mr. Justice MURPHY, deciding this case, it appears that the majority of this Court for whom he spoke have based the decision of the case upon the Board's own interpretations of the Act, in certain past cases in which the Board has held that industrial policemen may be subject to compulsory and exclusive union representation under the National Labor Relations Act, even though they have assumed obligations as individual members of municipal police forces. On this point, the majority opinion said:

> "The Board has frequently considered the status of plant guards who have been deputized as deputy sheriffs or special police. Where the private employer retains the right to fix the wages, hours or other working conditions of such guards, the Board's uniform conclusion has been that they are employees of the private employer and that they retain their rights under the National Labor Relations Act. See, *e. g., Luckenbach Steamship Co.*, 2 N.L.R.B. 181, 189; *American-Hawaiian Steamship*

*Co.*, 10 N.L.R.B. 1355, 1363-1364; *American Brass Co.*, 41 N.L.R.B. 783, 785; *Bethlehem-Fairfield Shipyard, Inc.*, 61 N.L.R.B. 901, 905-906; *Standard Steel Spring Co.*, 62 N.L.R.B. 660, 662-663. * * *

"We find it impossible to say that the Board is wrong in adopting this policy as to deputized guards. * * *

"Deputized guards bear the same relationship to management that non-deputized guards bear, a relationship that we discussed in the *Atkins* case,[1] ante, p. ....; and that we found to be adequate for the Board to find the existence of an employer-employee status. Likewise, their relationship to police or municipal authorities is not one that is necessarily inconsistent with their status as employees under the Act. Union membership and collective bargaining are capable of being molded to fit the special responsibilities of deputized plant guards and we cannot assume, as a proposition of law, that they will not be so molded. If there is any danger that particular deputized guards may not faithfully perform their obligations to the public, the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agents."

FIFTH: It is respectfully submitted that the Board's earlier decisions, cited and relied upon by this Court in the passage of its opinion which has been quoted, are of doubtful value in this case, for the following reasons:

1. In each of the Board's earlier decisions,

[1] *N.L.R.B. v. E. C. Atkins and Co.*, also decided by this Court on May 19, 1947, and not yet reported.

cited here, it was made clear that, although the policemen were "deputized," their public duties were, at the time the Board considered them, of little or no importance. In contrast, it has been stipulated in this case (R. 116) that the Otis Works is physically an extremely large and extremely complex industrial establishment; and that because of its magnitude and other characteristics *"its police protection by the ordinary police of the City of Cleveland is not practical or feasible; and, as a result, for a great many years, the police protection of the Works and the enforcement of law, peace and good order therein has been delegated wholly to the plant guard force."* (Italics supplied) Thus, although the public interest in the independence and efficiency of the guards in the earlier cases was small, in this case it is great.

2. It was not established by the Board's earlier decisions cited here, that representation, by a rank and file controlled Union, of guards or other agents exercising the proper authority of management or the law over the rank and file, would not or could not tend to impair the freedom and efficiency of the individual guards to discharge their public and private duties as such. Instead, these earlier cases were controlled by the absence of any substantial public or private need for the freedom or efficiency of the guards they affected from labor union obligations. Where the question has been raised (in any but the most recent cases—such as this case and those involving the still unsettled status of foremen and supervisors), the Board has always recognized that the loyalty legitimately demanded of its

members by every labor union is incompatible as a matter of law with the duties of an employee who exercises the authority of management over union members. To cite one, historically important example of the Board's recognition of this application of an anciently established principle, in the case of the *Maryland Drydock Company,* 49 N.L.R.B. 733 (May 11, 1943), the Board said (p. 740):

"The very nature of a foreman's duties make him an instrumentality of management in dealing with labor. * * * To hold that the National Labor Relations Act contemplated the representation of supervisory employees by the same organization which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests."

3. Furthermore, repeating a point or points made in the respondent's printed brief in this Court, the Board's present contention that, because industrial police are "employees" under the Act, they must be subject without restriction to compulsory representation by rank and file unions under the Act is, despite its acceptance by the majority opinion in this case, wholly inconsistent with the Board's own interpretations of the Act prior to 1942. The Board's earlier decisions, amongst them that in the *Maryland Drydock Company* case just cited, are referred to in the respondent's principal brief. They show that, until about 1942, the Board—and generally the labor unions also—construed the Act to mean that a line must be drawn between union labor, on the one hand, and non-union management

on the other; and that no union (or at least no rank and file union) could be qualified as exclusive representative of any essential element of managerial agents. It is true that, under this earlier rule, some "foremen," some "guards" and even some "deputized guards" were included in union bargaining units, as they were in the cases here relied upon by the Board and the opinion of this Court; but it was always because, in spite of their titles, their duties to management were—as a matter of fact—wholly compatible with union membership and its obligations. In this fact lies the reason why, although the Act is almost twelve years old, such cases as this case and the *Packard Motor Car Company* case, ... U. S. ..., decided March 10, 1947, are cases of first impression. Until a very recent period, no case involving any group of supervisors or industrial police, or other agents, whose undivided allegiance was actually required by any industrial management, had been pressed to any significant conclusion before the Board, or considered by any federal Court.

SIXTH: As the opinion of this Court declares, the question presented in this case is one to be resolved by interpreting the language of the Act, and so discovering the intentions of Congress as they are expressed in the Act. As is contended in the respondent's principal brief, the correctness of the Board's own original interpretation—that the Act required it to draw and maintain a line between union labor and non-union management, is strongly indicated by the informed acquiescence of Congress in that interpretation, through a period of at least seven years. In contrast to this, it now appears that

the Board's new rule, that any group of "employees" may be subject to union representation under the Act, no matter what may be their obligations as agents of management, is a rule which cannot enjoy the approval or the acquiescence of Congress. Instead, during the present session of Congress, a number of Bills have been introduced in efforts to disestablish the Board's new rule, and to reestablish its original rule.

One of these Bills, H. R. 3020, the "Taft-Hartley Bill," is intended to make a number of amendments to the National Labor Relations Act. Some of these proposed amendments have been the subjects of much controversy in Congress; but there are others to which no member of either House has thus far taken any serious exception[2]. Amongst these latter are, as a reading of the debates will show, an amendment of Section 2 (3) of the Act which would exclude from the definition of "employee," for the purposes of the Act, every super-

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[2]In the single material instance in which the now material sections of the Bill have been criticized adversely by the opponents of the Bill, the criticism approved the doctrine relied upon by the Sixth Circuit Court of Appeals in this case and the *Packard Motor Car Company* case: that agents of management in its dealings with rank and file labor should not be represented by rank and file unions. In the debates upon the Senate's original version (S. 1126) of the Taft-Hartley Bill, on May 1, 1947, Senator PEPPER, speaking in behalf of those who were opposed to the bill as a whole said (*Congressional Record*, May 1, 1947, p. 4490):

> "* * * We have never contended that a foreman should have a right to become a member of the union to which the employees en masse belong. I think of a foreman as related to the industrial organization, as being like a sergeant in the Army; I recognize the necessity for certain distinctions be-

visory employee who is obliged as such to exercise the authority of management over union labor; and, secondly, an addition or clarification of Section 9 of the Act, contained in Section 9 (b) of the Bill, which would forbid the qualification of any rank and file union, such as that involved here, as exclusive representative of such industrial policemen as those who serve in the Otis Works. The material portions of Section 9 (b) of the Bill, contained in a Conference Report submitted to the House of Representatives on June 3, 1947, and to the Senate on the next day, read as follows (*Congressional Record*, June 3, 1947, p. 6454):

"Sec. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative

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tween even non-commissioned officers and those who serve in the ranks in our armed forces; but, Mr. President, to exclude foremen from membership in the union to which the mass of the workers belongs does not mean that we have to deny to the foremen the right to make common cause to better their common lot."

of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

That this proposed amendment is intended to clarify the intentions of Congress upon the question in dispute in this case, by endorsing the view relied upon by the Circuit Court of Appeals and accepted as a sound one, as has been observed, by such critics of the Bill as Senator PEPPER, and by rejecting the contrary view urged here by the Board, is shown by the debates upon the Bill. As originally passed by the House of Representatives, H. R. 3020 had, by its Section 2 (12) (B), proposed to exclude wholly from the operation of the Act industrial policemen of the kind involved in this case (*Congressional Record*, April 16, 1947, p. 3607). The corresponding Bill in the Senate (S. 1126) had not included this provision. The report of the Conference Committee included the compromise provision which has just been quoted. Its purpose was explained and related to such cases as this case in an analysis of the Conference Report, presented in debate by Senator TAFT, one of the Managers in behalf of the Senate, as follows (*Congressional Record*, June 5, 1947, p. 6601):

"Section 9 (b) is also the same as section 9 (b) of the Senate amendment with the exception of an addition of a third clause relating to plant guards. As has been previously stated, the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the act. The conferees on both sides, however, have been impressed with the reasoning of the Circuit Court of Appeals for the sixth circuit in the Jones

and Laughlin case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. Although this case was recently reversed by the Supreme Court on the ground that the Board had it within its power to make such a holding, four of the Justices agreed with the Circuit Court of Appeals holding that this was an abuse of the discretion permitted to the Board under the act. One of the members of the Board has also expressed this view in a number of dissenting opinions. Under the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act, but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards a union which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership."

SEVENTH: It is true that the Taft-Hartley Bill is not, as this is written, a part of the law. The Conference Report was agreed to by the House of Representatives on June 4, 1947 (*Congressional Record*, June 4, 1947, p. 6549) and by the Senate on June 6, 1947 (*Congressional Record*, June 6, 1947, p. 6695), and the Bill was presented to the President, counsel are informed, on June 9th.

As this is written (June 11, 1947), the President has taken no action upon the Bill. The period of ten days, Sundays excluded, within which he may approve or veto the Bill, will not expire until June 20th. To meet the requirements of this Court's Rule 33, this Petition for Rehearing must be filed on or before June 13th; and for

that reason it is impossible to advance the Taft-Hartley Bill here as a law.

Should the Bill become law, however, or should it fail of enactment and be supplanted by other legislation, equivalent as respects the point presented here, which is enacted during the present session of Congress, the proper and satisfactory disposition of this controversy will, it is respectfully submitted, call for a further judicial interpretation of the rights of the parties, and for a rehearing and reconsideration of the matter in this Court.

WHEREFORE, your petitioner, the respondent in this case, respectfully prays the following relief:

1. That your honorable Court shall grant and order a rehearing and reargument of this case; and

2. That the mandate of your honorable Court in this case shall not be issued until the Court shall have passed upon this petition, and not in any event until a reasonable time after the Taft-Hartley Bill amending the National Labor Relations Act (H. R. 3020, 80th Congress, First Session) shall either have failed of enactment into law, or shall have become law; and

3. That your petitioner shall be granted such other relief in the premises as the exigencies of this case and the ends of justice may require.

And your petitioner will ever pray, etc.

JOHN C. BANE, JR.,
*Attorney for Respondent,*
JONES & LAUGHLIN STEEL CORPORATION.

*Of Counsel:*
H. PARKER SHARP
PAUL J. WINSCHEL

## CERTIFICATE OF COUNSEL.

I, the undersigned counsel for Jones & Laughlin Steel Corporation, the petitioner above named, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN C. BANE, JR.,
*Attorney for*
JONES & LAUGHLIN STEEL CORPORATION.

June 11, 1947.